NAFTA Chapter Eleven's Articles 1102, 1105, and 1110:
Are they working as planned?

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I. Introduction

The investment chapter—Chapter 11—of the North American Free Trade Agreement (NAFTA)[1] has recently become a hotly debated topic [2] and will continue to see increasing controversy.[3] According to a recent news article, "[i]f Congress had

[1] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 11, 32 I.L.M. 605, 639-49 [hereinafter NAFTA].
[2] Charles H. Brower, II., *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 38 & n. 2 (2003) (citing multiple authorities relating to the debate regarding NAFTA both within and outside of the trade community).
[3] Adam Laptak, *Nafta Tribunals Stir U.S. Worries*, THE NEW YORK TIMES, April 18, 2004, available at http://www.nytimes.com/2004/04/18/politics/18COUR.html? hp (last visited April 20, 2004). Mr. Laptak's article has received many comments regarding the current views of NAFTA. There are many sources on the internet with opinions posted regarding debated issues of the NAFTA. For example see LibertyPost.org where the New York Times Article has been posted and subjected too a great deal of criticism. That cite is available at: http://www.libertypost.org/cgi-bin/readart.cgi?ArtNum=45951 (last visited April 20, 2004).

known that there was anything like [the ability to challenge U.S. court decisions] in Nafta … they would never have voted for it."[4] In light of the growing controversy regarding the NAFTA's investment chapter, this paper considers how the obligations of national treatment, minimum standard of treatment, and expropriation affect the Parties to the NAFTA and their investors.

When considering the effects of the investor chapter, the fundamental question for NAFTA Parties and investors is whether the agreement will continue to fulfill its fundamental principles—to increase trade and provide a reliable forum to bring investment claims. While seeking to answer this question, this paper considers whether the text of the treaty and its subsequent interpretations have made the realm of NAFTA increasingly vague and unpredictable, or enhanced its guidance. The paper points out trends in tribunal rulings and makes recommendations regarding positions taken or supported by Parties and investors. Overall, this paper argues that Chapter Eleven is a substantial step toward proper regulation of cross-border investments, regardless of its tendency to increase claims against the host states.

Section II will consider the purpose and structure of Chapter Eleven of the NAFTA, since the purpose and structure of the agreement set the stage for what investors expect from the Parties. After considering the purpose and structure of the agreement, Section III will consider the application of Chapter Eleven to investor protection, trends in the decisions, and the potential effect on future investment relationships. Finally, Section IV will consider the likelihood that the Agreement will continue to fulfill its

[4] *Id. quoting* Abner Mikva, a former chief judge of the federal appeals court in Washington and a former congressman, one of the three arbitrators who decided the *Loewen* case.

fundamental purpose, ensuring a reliable forum for bringing investment claims and increasing trade.

II. Purpose and Structure of Chapter Eleven

The NAFTA Parties entered into the Agreement to expand their markets for goods and services, by establishing clear rules governing trade through a predictable commercial framework for business planning and investment.[5] To further the general purpose explained in the preamble, the parties established objectives to promote and increase cross-border investment opportunities and to ensure the successful implementation of investment initiatives.[6] The objectives established by the Agreement include specific principles and rules relating to "the implementation and application of [the] Agreement … and for the resolution of disputes."[7] The Agreement's investment objectives are implemented through Chapter 11,[8] which establishes standards of fair competition and non-discriminatory treatment of investors and investments within the free trade area.[9]

The terms of the NAFTA are adopted in addition to the "existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade [(GATT)],"[10] and in the event of a conflict between the agreements the NAFTA prevails.[11] This additive adoption becomes significant in investment relationships

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[5] *See id.* pmbl.
[6] *See id*. art. 102(1).
[7] *Id.*
[8] *See* Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 28 Pepp. L. Rev. 43, 46 (2001).
[9] *See* NAFTA, *supra* note 1, arts. 1099-1127.
[10] *Id.* art. 103.
[11] *Id.*

between host states and investors, because GATT and other previous negotiations did not include an extensive code on private investments.[12]

Chapter 11 contains detailed private investment protections, which cover a broad range of rights and remedies specifically established for individuals and enterprises from any of the NAFTA parties.[13] As part of the protection provided for private investors and their investments located within any other NAFTA country, the investment chapter "establishes a mechanism for the settlement of investment disputes that assures both equal treatment … and due process before an impartial tribunal."[14] The ad-hoc tribunal established by Chapter 11's dispute settlement mechanism settles claims regarding any breach of the obligations found within Section A of Chapter 11.[15] This arbitral tribunal holds governmental actions of NAFTA Parties to scrutiny they may not otherwise receive.[16]

A. Chapter 11 Section A

Section A of Chapter 11 has three objectives: "(1) establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign

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[12] *See S.D. Myers, Inc. v. The Government of Canada*, Final Award on the Merits, Separate Concurring Opinion, 19-22 (Nov. 13, 2000) (Schwartz, J., concurring), available at http://www.naftalaw.org/ (last visited April 20, 2004); *see also* Courtney N. Seymour, *The NAFTA Metalclad Appeal- Subsequent Impact or Inconsequential Error? ... Only time will Tell*, 34 U. MIAMI INTER-AM. L. REV. 189, 200 (Winter 2002).
[13] *See* NAFTA, *supra* note 1, arts. 1099-1027; *see also* David Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 652 (2001).
[14] *Id.* art 1115.
[15] *Id.* sec. B, arts. 1115-38; *see also* Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, *in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 173 (Judith H. Bello et al. eds., 1994); J. Christopher Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 460 (2002) (arguing that the NAFTA Chapter 11 dispute settlement mechanism is an extraordinary elevation of private standing.); *but see generally* Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465 (2002) (stating that Chapter 11's dispute settlement mechanism is intended to function within the general framework for international commercial arbitration).
[16] *See* Jack J. Coe, *Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issue, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1397 (2003).

investments and investors; (2) remove barriers to investment by eliminating or liberalizing existing restrictions; and (3) provide an effective means for the resolution of disputes between an investor and the host government."[17] These objectives increase foreign investment opportunities in the NAFTA countries because they provide investors guarantees of certain protection against harmful acts of the other governments that may harm their investments.[18]

Chapter 11's investment protections, guaranteeing certain levels of treatment by each of the NAFTA governments, are found in Articles 1102-1110.[19] These Articles guarantee rights ranging from equal treatment, limits on expropriation, and no performance requirements.[20] While there are several guaranteed rights, this paper will only consider the most controversial[21] and harmful,[22] or effective (depending on one's

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[17] *See* NAFTA, *supra* note 1, ch. 11, 1099-1027; *see also* Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 MINN. J. GLOBAL TRADE 209, 216 (2001).

[18] *See* NAFTA, *supra* note 1, art. 102(1). Article 102 lists the six primary objectives of NAFTA. These objectives are (1) eliminating barriers to trade, (2) providing fair competition, (3) increasing investment opportunities, (4) protecting intellectual property rights, (5) creating effective dispute resolution procedures, and (6) establishing a framework that can be built upon in future agreements.

[19] *See id.* arts. 1102-1110. Article 1102 provides national treatment. Article 1103 provides most-favored-nation treatment. Article 1104 provides that investors shall receive the better of the treatment provided by 1102 and 1103. Article 1105 provides a minimum standard of treatment. Article 1106 restricts performance requirements. Article 1107 allows investors to appoint senior management or any nationality. Article 1108 provides reservations and exceptions. Article 1109 provides for free transfers relating to an investment of an investor of another party. Article 1110 provides that no party may directly or indirectly nationalize or expropriate an investment of an investor of another party without payment of compensation.

[20] *Id.*

[21] *See* Joel C. Beauvais, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVT'L. L.J. 245 (2002) (claiming that the most recent criticism of Chapter 11 has focused on expropriation). *Id.* at 248. Tribunals' decisions indicate that Articles 1102 and 1105 may represent a considerably greater constraint on environmental and social regulation, and should be the priority of any discussions. *Id.*

[22] *See* Global Policy Forum, *NAFTA's Investor Protections Said to be One-Sided and Chilling*, June 6, 2001 available at http://www.globalpolicy.org/socecon/tncs/2001/naftachilly0606.htm (last visited April 23, 2004). "Multinational corporations are misusing a safeguard provision in the North American Free Trade Agreement (NAFTA) as a weapon to undermine legitimate regulation—particularly environmental laws—and to bully the governments of Canada, the US, and Mexico." *Id.*

perspective),[23] clauses allowing claims. Therefore, only three sections will be considered. Discussed first, Article 1102 contains the guarantee of National Treatment, which requires relative treatment—treatment of foreign investors similar to local investors in like situations.[24] Considered second, Article 1110 provides the guarantee against expropriation, which prohibits the taking of property without fair compensation.[25] Finally, supplying broad protection not based on any specific activity, Article 1105 guarantees a minimum standard of treatment, requiring fair and equitable treatment in accordance with international law. After considering the structure of these provisions and several tribunal interpretations, Section IV will show how these provisions allow investors to become a threat or at least a nuisance to the NAFTA Parties.

i. Article 1102 (National Treatment)

Article 1102 guarantees national treatment by requiring each NAFTA Party to give the investors of other Parties "treatment no less favorable than it accords, in like circumstances, to its own investors"[26] and "treatment no less favorable than the most favorable treatment accorded, in like circumstances, to investments of its own investors."[27] These two standards are based on the required level of treatment accorded investors from the different levels of government.[28] The federal government is required to provide treatment no less favorable than it provides its own investors in like circumstances.[29] At the state and provincial level, however, governments are held to the

[23] The argument regarding why Chapter 11 is harmful to states can be argued from the investors perspective to say that the Chapter is effective for protecting their investments, and thus effective for bringing a claim against the Host State.
[24] *See* NAFTA, *supra* note 1, art. 1102.
[25] *Id*, art. 1110.
[26] *Id*, art. 1102(1).
[27] *Id*. at (3).
[28] *Id.*
[29] *Id.*

higher standard of providing treatment no less favorable than the most favorable treatment provided to its investors in like circumstances.[30] In sum, the national treatment obligations require the Parties to determine whether an investor of another party is in like circumstances with one of its own investors, and then to "treat the investors … no worse than it treats its own investors and their investments."[31]

ii. Article 1110 (Expropriation)

Article 1110 prohibits the NAFTA Parties from nationalizing or expropriating "an investment of an investor of another Party … or take a measure tantamount to nationalization or expropriation," except when the investment is taken (1) for a public purpose, (2) in a non-discriminatory manner, (3) with at least the minimum level of due process provided Article 1105, and (4) on payment of compensation.[32] The expropriation requirement also provides that "[c]ompensation shall be paid without delay," it should "be equivalent to the fair market value of the expropriated investment," and "include interest … from the date of expropriation" until the date of payment.[33] The NAFTA expropriation definition potentially allows an investor to have a claim in more situations than traditional expropriation, because the definition includes the phrases "directly or indirectly" and "measure tantamount to nationalization or expropriation," which expand the situations where expropriation maybe found.[34] When the NAFTA's definition of expropriation is construed broadly, it can be extended to "covert and incidental

[30] *Id.*
[31] The United Mexican States, [2001] B.C.S.C. 664, para. 59.
[32] *See* NAFTA, *supra* note 2, art. 1110(1).
[33] *Id.* art. 1110.
[34] *Id.*

interference" depriving the property owner "in significant part" of its "reasonably-to-be expected economic benefit" even when not to the benefit of the host State.[35]

iii. Article 1105 (Minimum Standard of Treatment)

Article 1105 establishes a minimum standard of treatment that foreign investments must be accorded by each of the NAFTA Parties.[36] The minimum standard of treatment provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[37] This protection guarantees a "minimum standard" below which Parties are prohibited from treating the investments of an investor of another party "irrespective of the manner in which the Party treats other investors and their investments."[38]

The requirements of Article 1105 do not relate to specific activities, but provide a floor of protection for private investments under which a Party to the NAFTA may not fall below, regardless of the activity.[39] The rationale for the minimum standard of treatment explains that the "inclusion of a 'minimum standard' provision is necessary to avoid what might otherwise be a gap"[40] between the treatment guaranteed by national treatment and expropriation. The minimum standard of treatment protects investors when they have not suffered a taking of their property and the host-country treats domestic investors below a minimum threshold. The gap filling nature of this provision potentially subjects the NAFTA Parties to situations where "[t]he existence of a minimum

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[35] *See Metalclad v. United Mexican States*, Final Award, para. 103 (Sept. 2, 2000), available at www.naftalaw.org (last visited April 25, 2004)[hereinafter Metalclad Award].
[36] NAFTA, *supra* note 1, art. 1105.
[37] *See* NAFTA, *supra* note 1, art. 1105.
[38] *See* Metalclad Award, *supra* note 35, para. 67.
[39] *See* Seymour, *supra* note 12, at 202.
[40] *See S.D. Myers Inc v. Government of Canada, Final Award on the Merits*, para. 259 (Nov. 12, 2000), available at http://www.naftalaw.org/ (last visited March 30, 2004).

international standard means that in the eyes of international law, non-nationals might have rights and remedies that to some extent exceed those of nationals."[41]

Due to the protections afforded by Article 1105, a Party breaches the minimum standard of treatment by either not affording an investor or investment of another party treatment in accordance with the NAFTA, or by failing to provide the minimum treatment as required by international law.[42] The protection provided by the minimum standard of treatment is significant because of "the 'extra' security it provides private investors from what would otherwise be a major gap in the Agreement if [investors] were left only to rely on the protections offered in other [provisions] of [the] NAFTA."[43] Without this provision, a government could treat a foreign investor in an unjust and injurious fashion, as long as it treated its own nationals and other foreign investors just as poorly.[44] In such a case, the Party would not be breaching Article 1102 (National Treatment) or Article 1103 (Most Favored Nation Treatment) of the NAFTA.[45] It is only through Article 1105 that the international law requirements of due process, economic rights, obligations of good faith and natural justice are incorporated into the NAFTA.[46]

B. Submitting a Claim to Arbitration Chapter 11 Section B

Section B of Chapter 11 implements the Parties' objective of providing "effective procedures for the … resolution of disputes"[47] between a Party and an investor of another

[41] *Id.* para. 75 (Schwartz, J., concurring).
[42] *See* Metalclad Award, *supra* note 35, para. 67.
[43] *See* Seymour, *supra* note 12, at 201.
[44] *Id.* at 201-02.
[45] *See* Seymour, *supra* note 12, at 202.
[46] *See S.D. Myers, Inc. v. Canada*, Partial Award, para. 29 (Nov. 13, 2000) available at http://www.naftalaw.org/ (last visited March 7, 2004) [hereinafter S.D. Myers Partial Award].
[47] *See* NAFTA, *supra* note 1, art. 102(e).

Party[48] through a hybrid arbitration method.[49] Article 1115 explains that the dispute resolution mechanism assures both equal treatment and due process before an impartial arbitral tribunal.[50] Before a claimant can begin the process of appointing arbitrators for the particular dispute,[51] it must submit a claim to arbitrate,[52] it must consent to arbitrate in accordance with NAFTA, and it must waive its right to submit a claim before a court or other tribunal.[53]

The arbitral tribunals established under Section B, however, are limited to hearing investment disputes arising from the protections provided by Chapter 11.[54] Additionally, these ad-hoc tribunals only have the authority to hear those investment disputes arising out of a Party's breach of an on obligation guaranteed in Section A of Chapter 11.[55] By explicitly explaining the procedures and authority of the arbitral tribunals established in Chapter 11, the Parties guarantee comprehensive protection to the investments of one NAFTA Party's investors located in the territory of another.[56]

By providing special arbitration tribunal for NAFTA investment claims, the Parties have limited the number of possible claimants. To be eligible for Chapter 11

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[48] *See id.*, art. 1116(1); s*ee also Pope & Talbot v. Canada*, Award on Motion to Dismiss re: Whether Measures "Relate to" the Investment, para. 23 (Jan. 26, 2000), available at www.naftalaw.org (last visited April 25, 2004) [hereinafter Pope & Talbot Motion to Dismiss].
[49] *See* Coe, *supra* note 16, at 1389 (explaining that arbitration between states and private parties is "mixed" arbitration with characteristics of inter-state arbitration and of private international arbitration).
[50] *See* NAFTA, *supra* note 1, art. 1115.
[51] *Id.* art. 1123. "[T]he Tribunal shall comprise three arbitrators, one arbitrator appointee by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties." *Id.*
[52] *Id.* "[P]rovided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under [either the ICSID or UNCITRAL] Arbitration Rules."
[53] *Id.* art. 1121.
[54] *Id.*
[55] *See* Pope & Talbot Motion to Dismiss, *supra* note 48, para. 23.
[56] *See* Gantz, *supra* note 13, at 652; *see generally* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105, 107-12 (1986) (examining the origins, objectives, and provisions of U.S. Bi-lateral investment treaties).

dispute resolution, potential claimants must first prove that they are an "investor of a Party" and then allege that their "investment" (located within the territory of another Party) has suffered harm due to the breach of one of the subchapters of Chapter Eleven, Section A of the NAFTA.[57] However, once the investor has met the limited requirements of Article 1116, it does not matter whether the claim is well founded in fact or law.[58] The requirements to bring a claim only specify that the harm be alleged, which is a very limited burden of proof.[59]

III. Chapter Eleven Ad-Hoc Tribunals' Application of Investor Protection, its Trends, and Effects

Against the background of the purpose and structure provided in the previous section, the NAFTA's ad-hoc Tribunals have had varying interpretations of the Agreement. The NAFTA entered into force in 1994,[60] and since that time it has been tested by investors from each of the states parties.[61] The interpretations of the tribunals have tended to protect the interests of the nations by allowing only minimal recovery to investors.[62]

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[57] *See* NAFTA, *supra* note 1, Section A.
[58] *See Pope & Talbot v. Canada,* Award on Motion to Strike Claims, para. 26 (Aug. 7, 2000), available at www.naftalaw.org (last visited April 25, 2004); *see also Loewen Group, Inc. v. United States, Counter-Memorial of the United States* (Mar. 30, 2001), at 3, available at http://www.naftalaw.org/ (last visited March 30, 2004) (accusing Loewen of transforming Chapter 11 into a "no-fault insurance policy"); Ana Tschen, *Chapter 11: The Efforts to Define Expropriation*, 8-WTR CURRENTS: INT'L TRADE L.J. 50, 56 (1999) (The author proposes several ways to fix problems in Chapter 11. One of her suggestions is to increase the number of intermediate hurdles before it can directly bring a suit against a member party, which would result in many more cases being dismissed at an early stage.).
[59] *Id.*
[60] *See* NAFTA, *supra* note 1.
[61] *See* Ana Tschen, *Chapter 11: The Efforts to Define Expropriation.* 8 WTR CURRENTS: INT'L TRADE L.J. 50 (1999) (describing the claims brought against each of the NAFTA Parties).
[62] *See* Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOC'Y INT'L L. PROC. 251(2003) (explaining that the NAFTA Parties are not without their successes, because they have been prevailed in several cases and successfully "whittled down" cases on preliminary grounds); *but see* Daniel Q. Posin, *Cases Brought Under the NAFTA Investment Arbitration Rules*, 13 WORLD ARB. & MEDIATION REP. 67, at 79 (2002) (The rules may be

A. National Treatment

Claims brought on grounds of a violation of the national treatment requirement have proven that Article 1102 has several ambiguous terms.[63] In addition to issues regarding interpretation, the NAFTA Parties face limitations on their ability to freely regulate,[64] because Article 1105 requires similar treatment of an investor of one Party in "like circumstances" to that of an investor of the host state.[65] A national treatment analysis requires consideration of whether the measure treats the foreign investor contrary to the national treatment norm in order for a breach to occur.[66] The treatment part of the analysis has two additional considerations: (1) defining the proper level of treatment due a foreign investor and (2) the low threshold of proof required before an investor can validly bring a national treatment claim.

i. Like Circumstances

The "like circumstances" requirement contains two steps—finding like circumstances and determining whether there was discrimination between to investors

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interpreted as somewhat "hard-boiled" in favor of investment on the question of the possible conflict between encouraging investment and protecting the environment.).

[63] *See* Bryan Schwartz, *The Doha Round and Investment: Lessons from Chapter 11 of NAFTA*, ASPER REVIEW OF INTERNATIONAL BUSINESS AND TRADE LAW, Vol. 3, at 12 (Bryan Schwartz, Michelle Gallant, Trevor Wiebe, Shane Gross, & Jeysa Martinez-Pratt eds, 2003). This article suggests areas of concern under NAFTA that need to be considered in drafting of future multilateral free trade agreements. In Mr. Schwartz's concurring opinion, he wrote: "[In the context of the national treatment provision], [i]n determining whether a foreign investor has been discriminated against, contrary to Article 1102 (National Treatment) of NAFTA, a tribunal may in many cases have to pursue the same kind of approach as would be taken in an Article XX case under the GATT … [When there are legitimate objectives require foreign investors to be treated differently from local investors,] the appropriate conclusions will generally be that the foreign investors is not being subjected to the kind of discrimination that is prohibited by 1102 of NAFTA." *S.D. Myers, Inc. v. The Government of Canada*, 19-22 (Nov. 12, 2000) (Schwartz, J. concurring), available at www.naftalaw.org (last visited April 25, 2004).

[64] *See S.D. Myers, Inc. v. The Government of Canada* (Schwartz, J., concurring). Mr. Schwartz suggested that "reasonable freedom of regulation for host states was supported apart from Chapter XX [of the GATT]." *Id.* para. 252.

[65] *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2, at para. 78 (April 10, 2001), available at www.naftalaw.org (last visited April 22, 2004).

[66] *See* NAFTA *supra* note 1, art. 1102.

within that category.[67] According to one perspective, the analysis begins by considering the investor's business sector.[68] While being in the same business sector does not always guarantee likeness, this step of the analysis does reduce the number of businesses considered like.[69] In addition to difficulties proving likeness, investors face problems due to the inconsistent application of Article 1102 by the tribunals, which have not articulated a set definition for like circumstances.[70] Despite this lack of certainty, the NAFTA Parties have been afforded discretion to discriminate based on rational policy considerations.[71]

Illustrating the inconsistent application of the like circumstances requirement, *Pope &Talbot, Inc. v. Canada*, the Tribunal followed a broad interpretation of likeness and determined that all businesses in the same "business or economic sector" to be in like circumstances.[72] A similar perspective was adopted in *S.D. Myers v. Canada*, where the Tribunal relied on WTO and GATT decisions to determine that a broad interpretation was proper and should include "economic sector" and "business sector.[73] These two broad interpretations of like circumstances are distinguishable from the approach taken in *Loewen Group, Inc. v. United States of America*, where the investor claimed he was in

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[67] *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2, at para. 78 (April 10, 2001), available at www.naftalaw.org (last visited April 22, 2004).
[68] *Id. citing* The Organization for Economic Co-operation and Development, *National Treatment for Foreign-Controlled Enterprises* (claiming "in like situations", the comparison between foreign-controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector). *Id.* & n. 73.
[69] *Id.*
[70] *See* Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 61& nn. 127-32 (2003) (indicating that Chapter 11 requires national treatment for investors and investments in "like circumstances," but it does not explain whether the relevant factors for comparison should be based on market sector, production methods, or physical location).
[71] *See* Brower, *supra* note 8, at 72-75.
[72] *Id.* para. 78.
[73] *S.D. Myers v. Canada, Inc.,* Partial Award, para 250 (November 13, 2000), available at www.naftalaw.org (last visited April 22, 2004). The Tribunal stated "[t]he phrase 'like circumstances' is open to a wide variety of interpretations and in the abstract and in the context of a particular dispute." *Id.* at para. 243.

like circumstances because his business was in the same sector as a competitor who was the other litigant in a civil law suit.[74] The Tribunal did not agree, however, because the court was not after Mississippi residents.[75] By rejecting Loewen's likeness argument, the like circumstances interpretation adopted in Loewen was a much narrower interpretation than the tribunals of *Pope & Talbot* and *S.D. Myers*, because it determined that litigants in the same civil law suit were not in like circumstances.[76]

Regardless of the accepted interpretation, once a tribunal finds like circumstances it must determine whether the investor was afforded treatment no less favorable than the Party accords a national investor.

ii. Proper Level of Treatment

Defining the proper level of treatment has proven difficult, due at least partially to the structure of the text, which requires "no less favorable treatment" under Article 1102(2) and requires "no less favorable than the most favorable" treatment under Article 1102(3).[77] The proper level of treatment due an investor causes difficulty because of the range of national treatment afforded investors by the different levels of government.[78] Since investors interact with governments in a wide variety of circumstances, some domestic investors are given a "gold standard" level of treatment, while others are treated less favorably.

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[74] *See Loewen Group, Inc. v. United States of America*, Award (June 25, 2003), available at www.naftalaw.org (last visited April 20, 2004).
[75] *Id.*
[76] *Id.* para. 140.
[77] NAFTA, *supra* note 1, art. 1102.
[78] *Pope & Talbot v. Canada*, Final Merits Award, paras. 89-100 (April 10, 2001), available at http://www.naftalaw.org/ (last visited March 30, 2004) [hereinafter Pope & Talbot Final Merits Award]. As part of its "like circumstances" analysis the Tribunal considered the treatment of softwood lumber producers in the covered provinces as well as the treatment of softwood lumber producers in British Columbia.

To illustrate the difficulty in defining the proper level of treatment faced by the tribunal one should consider *Pope & Talbot v. Canada,* where Canada argued that Article 1102(2) "applies to the national government and [Article 1102(3) applies] to states and provinces."[79] This interpretation would allow national governments to provide foreign investments something less than the most favorable treatment.[80] The Tribunal disagreed and stated that "like states and provinces, national governments cannot comply with NAFTA by according foreign investments less than the most favorable treatment they accord their own investments."[81] The *Pope & Talbot* interpretation entitles foreign investments to treatment equivalent to the best treatment given to domestic investors and investments in like circumstances.[82] Thus, according to *Pope & Talbot*, the NAFTA parties are obligated to treat foreign investors better than the average domestic investor,[83] and the foreign investor must receive "gold standard" treatment.

In another tribunal interpretation finding that Article 1102 does not allow discriminatory treatment at any level, *Marvin Roy Feldman Karpa v. United Mexican States*, the investor claimed that Mexico had expropriated its investment because it refused to give a tax refund.[84] Feldman claimed violations under Article 1110 and discriminatory treatment between it and domestic competitors under Article 1102.[85] On the 1102 claim, the Tribunal seemed to focus more on the character of the business

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[79] *Id.* para. 39.
[80] *Id.*
[81] *Id.* at para. 41.
[82] *Id.*
[83] *See* Coe, *supra* note 16, at 1413; *but see* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, at 41-43 (2003) (The authors conclude that the competitive advantage given foreign investors under international law relative to local enterprises is more concretely detrimental than the potential chill on regulation, which they regard as more speculative.)
[84] *Marvin Roy Feldman Karpa v. United Mexican States*, Award of Dec. 16, 2002, Case No. (ARB)AF/99/1, available at http://www.naftalaw.org/ (last visited March 25, 2004) [hereinafter Feldman Award].
[85] *Id.*

involved, rather than on the more fundamental question of who was actually in competition.[86] The Tribunal made a finding that Article 1102 protects investors from all discriminatory treatment—whether intended or not.[87] The evidence produced by Mexico failed to prove that there was neither effective difference in treatment, nor that there was a good reason for the difference, so Feldman won.[88] The *Feldman* award "is an important decision, because it indicates that governments must be open and transparent about the way they treat foreigners and their domestic competitors, or be prepared to face the consequences."[89]

iii. Low Threshold for the Prima Facie Case

The prima-facie case for the investor requires the investor to simply allege different treatment.[90] By showing different treatment the investor has satisfied the initial requirement that a Party has presumptively violated Article 1102, unless the Party can show that the differences in treatment have a reasonable nexus to rational government policies that do not distinguish between foreign-owned and domestic companies.[91] The Tribunal in *Pope & Talbot* explained that "**any difference**" in treatment must be addressed, and the Party must show that the difference in treatment bears a reasonable relationship to rational policies not motivated by preferences of domestic over foreign

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[86] Todd Weiler, *NAFTA News—Final Awards in the Karpa and ADF Cases*, available at http://www.naftalaw.org/ (last visited March 10, 2004).
[87] *Id.*
[88] *See* Feldman Award, *supra* note 84, para. 94.
[89] Todd Weiler, *NAFTA News—Final Awards in the Karpa and ADF Cases*, available at http://www.naftalaw.org/ (last visited March 10, 2004) (herein after NAFTA News).
[90] *See* NAFTA *supra* note 1, art. 1119 (requiring that the investor submit a claim alleging the provisions of the agreement to have been breached); *see also* Aaron Cosbey, *NAFTA's Chapter 11 and the Environment: A Briefing Paper for the CEC's Joint Public Advisory Committee* (2002), available at http://www.iisd.org/trade (last visited April 22, 2004) (stating that "there is no 'filter' to weed out frivolous or strategic claims").
[91] *See* Pope & Talbot Final Merits Award, *supra* note 78, para. 78.

owned investments.[92] So, once the investor has made a claim of different treatment the burden shifts to the Party, which allows investors to become a burden to governments who must address any differences in treatment.[93] Regardless of the increased burden to the Party, proving a rational relationship to a governmental purpose is also a low standard, so the claim by the investor is likely to fail, unless there is a strong showing of discrimination. However, simply having to respond to the claim by itself may be a large inconvenience to the Party.

B. Expropriation

As stated above, the investment chapter prohibits a party from expropriating property or taking a measure tantamount to expropriation with out compensation.[94] In general, the term "expropriation" carries with it the connotation of a "taking" of property by a governmental body.[95] Chapter 11's expanded definition of expropriation potentially allows investors to bring actions for a "wide variety of 'measures,' including [challenges of] laws and regulations that allegedly protect public health, safety and the environment[.]"[96] This definition, when taken to its extreme, gives parties opposed to the NAFTA the ability to claim that the restriction on expropriation provides "the broadest protection for the investments of foreign investors,"[97] and potentially gives foreign investors better treatment than domestic investors.[98] Conversely, the

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[92] *Id.* para 79 (emphasis added).
[93] *Id. See also* Aaron Cosbey, *supra* note 90 (describing the provisions as shifting from tools of last-resort protection from unfair treatment to weapons of choice for preventing or attacking unfavorable regulations—they have gone from shield to sword).
[94] *See supra* notes 32-4 and related discussion.
[95] *See* S.D. Myers Partial Award, *supra* note 46, para. 280, November 13, 2000.
[96] *See* Brower, *supra* note 8, at 51.
[97] *Pope & Talbot v. Canada*, Interim Award, paragraph 82 (June 26, 2000), available at www.naftalaw.org (last visited April 25, 2004) [hereinafter Pope & Talbot Interim Award].
[98] *See* David Gantz, *NAFTA Investment Law and Arbitration: the Early Years*, Panel discussion titled "The Future for International Investment Protection," March 22, 2003.

interpretation the Parties support is more restrictive, requiring "a significant degree of deprivation of fundamental rights of ownership."[99] Some critics support the government's position and claim that the expropriation protection in Article 1110 allows "extraordinary attacks" on the governments' ability to regulate in the public interest.[100]

Regardless of the historic definition of expropriation and any individual's interpretation of Article1110, the additional terms "tantamount to expropriation" provide leeway for expansive construction.[101] The first cases brought under Article 1110 show this type of expansive interpretation, because they did not involve the traditional forms of expropriation,[102] rather they involved claims that regulation of investments amounted to an expropriation.[103] These cases also suggest that "not every business disruption attributable in some fashion to host state regulation constitutes a [compensable] taking."[104]

In addition to the expansive definition adopted in the Agreement, the Parties face uncertainty in the different tribunal interpretations regarding what constitutes a taking.[105] For example in *Metalclad v. The United Mexican States*,[106] the Tribunal stated that the prohibition on expropriation "limits open deliberate and acknowledged takings of

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[99] *See* Pope & Talbot Interim Award, *supra* note 97, para. 88. The NAFTA Parties control the interpretations Tribunals make because they have the ability to use the FTC to publish binding interpretations. *See* discussion *infra* note 142 and accompanying text.

[100] *See* Mary Bottari, *NAFTA's Investor "Rights": A Corporate Dream, A Citizen Nightmare*, Trade Madness! Volume 22, Number 4, available at http://www.ratical.org/co-globalize/mmNAFTA2001.pdf (last visited April 22, 2004) (claiming that "NAFTA allows corporations to sue the national government of a NAFTA country in secret arbitration tribunals if they **feel** that a regulation or government decision affects their investment").

[101] *Id.* at para. 281. Typically regulatory action is not deemed to amount to expropriation, and regulatory conduct by public authorities is unlikely to be the subject of a legitimate complaint under Article 1110.

[102] Traditional expropriation is based on the acts of a government taking or modifying an individual's property rights, esp. by eminent domain. Black's Law Dictionary 477 (7th ed. 2000).

[103] Folsom, Gordon, and Spangole, INTERNATIONAL BUSINESS TRANSACTIONS, §32.24, p. 1048, (2001).

[104] *See* Coe, *supra* note 16, at 1431.

[105] *See id.* (pointing out the extent which a regulation may be an indirect taking).

[106] *Metalclad v. United Mexican States*, Notice of Intent (Dec. 30, 1996), available at http://www.naftalaw.org/ (last visited April 20, 2004).

property, such as outright seizure or formal obligatory transfer of title in favor of the host state, as well as covert or incidental interference with the uses of the property or the reasonable expected economic benefit of property."[107] The claim in *Metalclad* was based on an ecological degree, which resulted in a complete restriction on the profitable use of the investor's property. [108] The Tribunal held that Mexico expropriated Metalclad's investment through contradictory, unpredictable, and unclear behavior.[109] The Tribunal allowed an investor to bring claim when "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment."[110] However, regardless of the *Metalclad* Tribunal's broad interpretation, all expropriation claims since *Metalclad* have failed.[111]

In another case claiming expropriation under Article 1110, *Pope & Talbot v. Canada*,[112] the investor claimed that the Canadian government had expropriated its property by denying it access to the United States market.[113] The Tribunal considered facts relating to control of the business, whether the business was still in operation, and the business's profitability.[114] While the Tribunal did consider an interesting argument of creeping expropriation, it did not find Canada's activity sufficient to be a taking.[115] The

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[107] *See* Metalclad Award, *supra* note 35, para. 103. In *Metalclad*, the company claimed that Mexico and its local governments interfered with the development and operation of a hazardous waste landfill investment, which breached Mexico's obligations under Articles 1105 and 1110 of the NAFTA. In addition to finding expropriation, the Tribunal held that Mexico's behavior was a violation of the minimum standards of treatment.
[108] *Id.*
[109] *Id.* at paras. 107-8.
[110] *Id.* at para. 99. "The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA." *Id.*
[111] *See* Coe *supra* note 16, at n. 57.
[112] *Pope & Talbot v. Canada,* Award in Respect of Damages (May 31, 2002) available at www.naftalaw.org (last visited April 22, 2004) [Hereinafter Pope Damages Award].
[113] *Id.*
[114] *Id.*
[115] *Id.*

Tribunal explained that Article 1110 was not breached because the investor was not denied of the entire profitability of its investment.[116] The Tribunal awarded Pope & Talbot a minimal amount of damages on other grounds, but did not find the regulations sufficiently restrictive to justify an award.[117]

These different interpretations show a general reluctance to place a strict definition or limit on expropriation, which may be due to the tension between sovereignty and individuality. The best claims seem to be based on direct regulation of property, and loss of a business interest, which have been found to be tantamount to expropriation.[118] According to one Tribunal, the test for expropriation is whether interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner.[119] To be successful in a claim for expropriation, a claimant must advance a claim that they have lost the entire use or value of an asset, which was seen most clearly in *Metalclad*. However, it is still unclear whether a showing of the taking of a property right alone will be enough. This is because the Tribunals have been very protective of the sovereignty of the host states, requiring only a rational basis for the harmful regulation.

C. Minimum Standard of Treatment

When an investor claims a breach of the minimum standard of treatment, the question is whether there has been a breach of international law, including fair and

[116] *Id.*
[117] *Id.*
[118] *See* Pope & Talbot Interim Award, *supra* note 97, paras. 96-105, June 26, 2000.
[119] *Id.*

equitable treatment.[120] Article 1105, like 1102 and 1110, has two interpretation concerns—what are "fair and equitable treatment" and "international law."

Due to the extra level of treatment afforded foreign investors, it is no surprise that "[t]he scope of Article 1105's investment protections is presently subject to great debate."[121] There have recently been several disputes "arbitrated under the Chapter 11 dispute resolution mechanism have highlighted the tension between protections provided to investments and the power of governments, including state or provincial governments, to regulate."[122] The minimum standard of treatment provision potentially opens the NAFTA parties to a variety of additional claims. These claims include second guessing of the NAFTA tribunals, challenges to the decisions of municipal courts, denial of justice claims, and claims regarding the administration of justice, either procedurally or substantively, in a seriously inadequate way. However, unlike 1102 and 1110, where the Parties have allowed the Tribunals to interpret the terms, the Parties (seemingly threatened by the wording) issued "Notes of Interpretation," adding the term "Customary" to the clause.[123] This section will first consider the original text and then the "Notes of Interpretation."

i. Fair and Equitable Treatment

"Fair and equitable treatment" is not defined in the text of the NAFTA. The term does appear in "[n]early all recent BITs that require investments and investors covered under the treaty … inspite of the fact that there is no general agreement on the precise

[120] *See* NAFTA, *supra* note 1, art. 1105.
[121] *See* Courtney C. Kirkman, *Fair and Equitable Treatment: Methanex v. United States and The Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 355 (2002).
[122] *Id.* at 344.
[123] *See* NAFTA- Chapter 11- Investment, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001) available at http://www.naftalaw.org/ (last visited March 30, 2004).

meaning of this phrase."[124] However, the BITs also do not clearly define the phrase."[125] Due to the lack of a precise definition, this vague and undefined phrase has caused Tribunals to consider its interpretation as well as undergo a great deal of criticism.[126] Both scholars and practitioners have debated the scope of this phrase.[127] Their debate concerns "whether fair and equitable treatment is limited to the minimum standard in international law, whether it is an independent and objective standard based on the plain meaning approach of statutory interpretation, or whether it has evolved into an independent norm of customary international law."[128] The more restrictive view supports a finding that the fair and equitable treatment provision should provide a "baseline of protection which will be useful principally in situations where other substantive provisions of international law and national law provide no protection. It provides a basic principle of equitable treatment to guide interpretation of other BIT provisions."[129]

On the other hand, the broader interpretation views equitable treatment as an additional requirement, which "goes far beyond the minimum standard and afford[s] protection to a greater extent and according to a much more objective standard than any previously employed form of words."[130] This broad interpretation favors the investors' position,[131] because it may include measures that "are not plainly illegal in the accepted

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[124] Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 85 (1995).
[125] *See* Kirkman, *supra* note 121, at 346.
[126] Charles H. Brower, II., *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003).
[127] *See* Dolzer & Stevens, *supra* note 124, at 58-60; Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 102-05 (2000); Kirkman, *supra* note 121, at 346.
[128] *See Id.*
[129] *See* Kirkman, *supra* note 121, at 346, quoting Vandevelde at 76-77.
[130] *See* Dolzer & Stevens, *supra* note 80, at 59.
[131] Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 55 (2001).

sense of international law."[132] However, since fair and equitable treatment would be "distinct … from … principles of international law,"[133] this view might suggest an "open-ended mandate to second-guess the governmental decisions of NAFTA parties."[134]

As these positions show, the source of contention regarding the "fair and equitable" standard is the two diametrically opposed views taken by the states and the investors. "Investors generally argue for the more expansive view, seeking greater investment protection, whereas states generally argue for the more restrictive view, seeking to limit their liability to foreign investors."[135]

ii. In Accordance with International Law

The argument regarding international law has the same two forces influencing its interpretation. Prior to the interpretation, in *Pope & Talbot, Inc. v. Canada*,[136] Canada argued for a narrow interpretation of Article 1105's fair and equitable treatment provision.[137] Canada argued that Article 1105's scope of fairness was consistent with traditional customary law principles of fairness and did not extend further than the customary international minimum standard of treatment of aliens.[138] The Tribunal acknowledged the possibility of a broader interpretation encompassing fairness in addition to the international law minimum.[139] The Tribunal considered U.S. and other state' BITs and determined that they demonstrated an evolution of investor rights to

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[132] *Id.* & n. 67.
[133] *Id.* at 56, *quoting* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105, 125 (1996).
[134] *Id.*
[135] *See* Kirkman, *supra* note 121.
[136] *Pope and Talbot, Inc. v. Canada Award on the Merits of Phase 2*, (April 10, 2001) available athttp://www.naftalaw.org/ (last visited March 30, 2004).
[137] *See* Gantz, *supra* note 13, at 698; *Pope and Talbot, Inc.,* Award on the Merits of Phase 2, para. 108.
[138] *See Pope and Talbot Award on the Merits of Phase 2*, paras. 108-09.
[139] *Id.* at para 110.

include fairness elements beyond customary international law.[140] It rejected the textual argument that the language of article 1105 ("in accordance with international law, including fair and equitable treatment") shows that the "drafters of NAFTA Chapter 11 'excluded any possible conclusion that the parties were divergent from the customary international law concept of fair and equitable treatment.'"[141]

In taking this approach, the *Pope & Talbot* Tribunal rejected Canada's argument that fair and equitable treatment was only such treatment accorded under customary international law, which is a broad interpretation of Article 1105.[142] Additionally, by adopting such a broad interpretation of Article 1105 the *Pope & Talbot* Tribunal "subjects the NAFTA parties to greater liability while providing a greater degree of protection for investments."[143]

iii. Notes of Interpretation

In seeming response to *Pope & Talbot*,[144] and an attempt to clarify the differing interpretations of 1105, the trade ministers of the three NAFTA parties published "Notes of Interpretation."[145] According to the FTC interpretation, "the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[146] If construed strictly, the interpretation drastically restricts a tribunal's ability to define "international law." Perhaps the FTC interpretation was

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[140] *Id.* at para 111.
[141] *Id.* at para 112-15.
[142] *See* Kirkman, *supra* note 121, at 346.
[143] *Id.*
[144] *See* Brower, *supra* note 62 (explaining that "it was widely thought that that interpretation was timed to influence the *Pope & Talbot* tribunal, whose award on liability had interpreted Article 1105 differently).
[145] *See* NAFTA- Chapter 11- Investment, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001) available at http://www.naftalaw.org/ (last visited March 30, 2004).
[146] *Id.* The NAFTA drafters anticipated unacceptable interpretation of the text, so they retained the right to conclusively interpret the text. *See* NAFTA *supra* note 1, art. 1131.

fortuitously published as the *Pope & Talbot* case was set for its damages phase,[147] but more likely the NAFTA parties foresaw the likely outcome of the case and sought to limit their liability, both in the present case as well as in future claims.

The significance of the FTC interpretation is shown in the trend adopted by several tribunals considering claims under Article 1105 of Chapter 11 both prior to and after the interpretation. Before the FTC interpretation, "NAFTA jurisprudence indicated a trend towards an expansive view of Article 1105's fair and equitable treatment provision, which suggested increasing protection for foreign investments"[148] and potentially greater liability for the Parties. The Tribunals' interpretations allowed several claims to succeed due to violations of Article 1105. First, in *Metalclad* the Tribunal read Article 1105 with a broad interpretation, allowing the investment protection.[149] Second, in *S.D. Myers*, the tribunal held that intentional discrimination on the basis of nationality was a beach of international law, and thus a violation of 1105.[150] Finally, in *Pope & Talbot*, the most expansive interpretation of the provision, the Tribunal found fair and equitable treatment encompassed fairness elements in addition to the international law minimum.[151]

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[147] On April 10, 2001 the Tribunal held that Canada had breached Article 1105 in respect to its Verification and Review Episode. *Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages, para. 48, May 31, 2002. On August 10, 2001, Canada sent the Interpretation to the members of the *Pope & Talbot* Tribunal. *Id.* at para. 11. The interpretation was published on July 31, 2001. *Canada Department of Foreign Affairs and International Trade*, available at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp (last visited April 22, 2004).
[148] *See* Kirkman, *supra* note 121, at 389.
[149] *See* Gantz, *supra* note 13, at 708.
[150] Todd Weiler, *A First Look at the Interim Merits Award in S.D. Myers, Inc. v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT'L & COMP. L. REV. 173, 184 (2001).
[151] *See* Gantz, *supra* note 13, at 699.

After the FTC interpretation, the tide shifted from expansion to restriction.[152] The newly narrowed scope of 1105 subjects the NAFTA Parties to a lower level of scrutiny, as long as they are dealing equally with investors. However, unfortunately, this lower level of scrutiny was ignored in *ADF Group Inc. v. United States of America*,[153] where the Tribunal did not resolve the question of what protections exist for an investor in "customary international law" under Article 1105.[154] The Tribunal concluded that the investor had failed to provide sufficient evidence that a customary international law rule exists which would require states to provide "fair and equitable" treatment to an investment.[155]

In a second case considering fair and equitable treatment in accordance with international law, *Azinian v. United Mexican State*,[156] the Tribunal once again found that the claimants failed to put forth an Article 1105 claim.[157] The Tribunal explained that "[t]he only conceivably relevant substantive principle of Article 1105 is that a NAFTA investor should not be dealt with in a manner that contravenes international law," and the only claim of an Article 1105 violation was through the Article 1110 claim.[158] The Tribunal refused the Article 1110 claim and would not allow the Article 1105 either.[159] The Tribunal noted, "[i]f the claimants had advanced arguments that the Mexican courts

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[152] *See* Kirkman, supra note 121, at 390.
[153] *ADF Group Inc. v. United States of America*, Final Award (January 9, 2003), available at http://www.naftalaw.org/ (last visited April 20, 2004). ADF Group claimed that the U.S. DOT has breached the NAFTA by requiring federally funded state highway projects to solely use steel produced in the United States. ADF Group claimed inter alia that the U.S. had breached its obligations under Article 1105 of the NAFTA.
[154] Todd Weiler, *NAFTA News—Final Awards in the Karpa and ADF Cases*, available at http://www.naftalaw.org/ (last visited March 10, 2004).
[155] *Id.*
[156] *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/21 (Nov. 1, 1999), available at http://www.naftalaw.org/ (last visited April 20, 2004).
[157] *Id.* para. 92.
[158] *Id.*
[159] *Id.*

refused to hear their case, subjected them to undue delay, seriously failed to administer justice, or clearly and maliciously misapplied the law, then a denial of justice claim could have been substantiated.[160]

Finally, *The Loewen Group, Inc. v. United States*[161] is the only post-interpretation case to potentially subject a Party to liability. In that case, the investor claimed a breach of Article 1105, because the court failed to provide fair and equitable treatment by allowing his opponent's attorney "to repeatedly elicit irrelevant and highly prejudicial testimony, and to make irrelevant and highly prejudicial comments, about the nationality, race, and class of the principal parties in the litigation."[162] Loewen also claimed that the "grossly excessive verdict" and Mississippi's application of the bond requirement were denials of fair and equitable treatment.[163] According to the Tribunal, the test to find a breach of Article 1105 requires the decision of the government be "clearly improper and discreditable."[164] The Tribunal agreed that the actions of the Mississippi court violated 1105 due to the "methods employed by the jury and countenanced by the judge were the antithesis of due process."[165] However, it rejected Loewen's claim for other reasons.[166]

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[160] *Id.* at 102-03.
[161] *Loewen Group v. United States of America*, *Final Award*, June 26, 2003, available at http://www.naftalaw.org/ (last visited March 30, 2004) [hereinafter Loewen Group Final Award]; *see also* Michael I. Krauss, NAFTA Meets the American Torts Process: O'Keefe v. Loewen, 9 Geo. Mason L. Rev. 69, 87 (2000).. The first arbitration in which the investor claimed that the host state's judicial process violated Chapter 11 investment protections.
[162] Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 237-38.
[163] *Id.*
[164] *See* Loewen Group Final Award, *supra* note 161, para. 133.
[165] *Id.* para. 122.
[166] *Id.* at paras 142-157, 165-171, and 207-217. The Tribunal explained both procedural and substantive reasons for denying the claim. The substantive grounds for rejecting the claim were due to Loewen's failure to exhaust the local remedies, which according to the Tribunal would have required an appeal to the U.S. Supreme Court. The procedural grounds were due to Loewen's bankruptcy proceeding and Loewen's loss of the ability to claim it was an international investor.

The above claims are significant for two principal reasons. First, the pre-interpretation claims show the evolution of the claims under Article 1105 from a period where the Tribunal wrestled with the meaning of the minimum standard[167] to a situation where the Tribunal rejects a legitimate claim due to procedural and substantive issues.[168] Second, these claims show the evolution of the investors' claims from straight forward claims of unjust and unfair treatment to complex arguments involving the minimum levels of due process.[169]

Along with the interpretation has come new concern regarding the "attempt of the NAFTA Parties to re-write the NAFTA Article 1105 through the mechanism of an all Party interpretation."[170] Investors become even more apprehensive when an interpretation is issued "well into the process of arbitration,"[171] without permission from the parties to the claim, and when one of the parties of the arbitration uses its authority (as a Party to the agreement) to impose pressure on the Tribunal.[172] This new concern is warranted, since the fundamental principle behind provisions like Article 1105 are to provide foreign investments with the security that, once they have entered into the market, the host state cannot treat them worse than the standard of treatment provided for under

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[167] *See supra* notes 63- 70 (The general trend has been one of defining the requirements of 1105 through interpretation.).
[168] *See Loewen Group supra* notes 74-6 and related discussion.
[169] In *ADF Group* the argument was based on alleged requirements of the use of U.S. steel in federal highway projects, which is facial discrimination. In *Azinian* it was the termination of a contract, which is a direct act taken by government officials. In *Loewen Group* the claim was that the court did not fulfill its obligations, which was a denial of due process. In the *UPS* case it is the postal service of Canada that is being scrutinized. U.S. courts have been the primary subject in the claims of *Loewen* and *Mondev*. Likewise, purported health and welfare regulations were subjected to review in *S.D. Myers*. And finally, in *Methanex* environmental regulations were the easy target.
[170] Ian. A. Laird, *Betrayal, Shock and Outrage- Recent Developments in NAFTA Article 1105*, ASPER REVIEW OF INTERNATIONAL BUSINESS AND TRADE LAW, Vol. 3, at 185 (Bryan Schwartz, Michelle Gallant, Trevor Wiebe, Shane Gross, & Jeysa Martinez-Pratt eds, 2003).
[171] Fourth Opinion of Sir Robert Jennings, *Methanex Corporation and United States of America*, "The meaning of Article 1105(1) of the NAFTA Agreement," September 6, 2001 at 4-5.
[172] *Id.*

international law.[173] This interpretation will raise additional concerns for investors that host countries may use future interpretations to persuade Tribunals to find in the host state's favor, which will have a negative effect on future investments.[174]

IV. Chapter Eleven's Continued Fulfillment of the Purpose of NAFTA

This paper supports the proposition that while in theory the investment chapter creates broad protection for investors, the true effect of the chapter has yet to be determined.[175] Individual opinions regarding the agreement cover every point on a broad spectrum, which can best described as "mixed opinions".[176] Some supporters and scholars feel that Chapter 11 works as intended with just protections, both in purpose and effect.[177] Others feel Chapter 11 has a "misguided, misinterpreted, or misused" application.[178]

The theories supported by critics are varied, ranging from not providing sufficient protection for the investors to taking too much power from the sovereignty of nations.[179]

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[173] *See* Laird, *supra* note 173, at 186.
[174] By raising concern with interpretations, the NAFTA parties undermine the fundamentals of the agreement. *See generally*, Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSAT'L L. 37, 85-6 (2003) ("Given the absence of clear rules defining their relative authority—or even a clear procedure for creating such rules—legitimacy concerns seem likely to plague the relationship between the Commission and Chapter 11 Tribunals.").
[175] *See* Coe, *supra* note 16. The article states that "the Tribunal's power to influence the mix of competing interests by attaching a penalty to government choices has far reaching implications."
[176] Andrew J. Shapren, *NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy*, 17 TEMP. INT'L & COMP. L.J. 323, 346 (2003).
[177] *Id. See also* International Trade Strategies Pty Ltd, *NAFTA Chapter 11—Issues and Opportunities*, July 2002, available at http://www.apec.org.au/docs/fta2mcm.pdf (last visited April 22, 2004) (concluding that all of the controversy surrounding may not be warranted). The author explains that the provisions of Chapter 11, while broad, have specific requirements that must be based in fact. *Id.* at 15. And they demonstrate that it is not simply legitimate government regulation, but discriminatory or confiscatory action that will result in a breach. *Id.*
[178] *See* Sharpen, *supra* note 176. *See also* Coe, *supra* note 16, at 1385 (stating that substantive trends have been established and several strengths and weaknesses have been illuminated).
[179] *See* Brower, *supra* note 62 (describing the NAFTA tribunals as the "Supreme Court of North America" for the issues before it); Daniel Q. Posin, *Cases Brought Under the NAFTA Investment Arbitration Rules*, 13 WORLD ARB. & MEDIATION REP. 67 (2002) (explaining that the unprecedented structure in which large, medium, and small private companies can compel the governments of Canada, the US, and Mexico to arbitrate).

Taking too much power from the sovereignty of nations includes the broadest and most often cited criticism, which claims that "through Chapter 11 foreign corporations' interests may be put above those of citizens of a country."[180] According to this perspective, "[t]oo broad a reading subjects states' legitimate regulatory efforts to great risk, particularly in areas of public health and the environment. Likewise, providing investment protection should not come at the cost of inhibiting states' abilities to enact legitimate regulation."[181] However, regardless of the strength of the critics' claims, the true value of Chapter 11 lies in the insights provided from the proposals that actually succeeded and the ability of the Parties to test ideas for the global trade system.[182]

Chapter 11 does not merely provide a negative assurance against discriminatory government action.[183] It provides a necessary regulatory body with the authority to award large scale remedies.[184] According to this research, political sensitivity is not enough to ignore possible benefits of investment legislation, yet the economic benefits are put at a significant risk through the increasing alarmist criticism.[185]

V. Conclusion

The Investment Chapter of the NAFTA is currently a growing concern to the public in the NAFTA countries. As the controversy surrounding the Investment Chapter increases, individuals need to understand the legitimate and growing concerns of both the Parties to the NAFTA and their investors. As explained at the beginning of this paper,

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[180] *See* Sharpen, *supra* note 176.
[181] *Id.*; *see also* Gantz, *supra* note 13.
[182] Bryan Schwartz, *The Doha Round and Investment: Lessons from Chapter 11 of NAFTA*, ASPER REVIEW OF INTERNATIONAL BUSINESS AND TRADE LAW, Vol. 3, at 2 (Bryan Schwartz, Michelle Gallant, Trevor Wiebe, Shane Gross, & Jeysa Martinez-Pratt eds, 2003). This article suggests areas of concern under NAFTA that need to be considered in drafting of future multilateral free trade agreements.
[183] *See* International Trade Strategies Pty Ltd. *supra* note 177, at 15.
[184] *Id.*
[185] *Id.*

the fundamental question for both the Parties to the NAFTA and do their respective investors deals with whether the agreement will actually increase trade and provide a reliable forum to bring investment claims. While this paper has shown that there are still many unanswered and unexplored issues under the NAFTA, the agreement has proven to provide much of the protection it was intended to provide. The Agreement is still in its infancy and has the ability to conform to the needs of the investors and Parties.

In general, Chapter Eleven is a substantial step toward proper regulation of cross-border investments, regardless of its tendency to increase claims against the host states. This paper has pointed out several inconsistencies in Chapter 11. It has considered the trend of toward restricting the coverage of the chapter. Finally, has pointed out why investors will continue to bring claims.

One area of particular concern is the amount of influence the parties to the disputes have on the Tribunal, and ultimately on the outcome of their dispute. This power and the lack of a screening process give investors the incentive to push the guarantees provided in the agreement. Investors are able to do this testing with relatively little threat of adverse consequences to themselves, and at the same time impose a significant burden on the host-state.

In the future important steps need to be taken by the NAFTA Parties prior to implementing regulations that involve foreign investors. By adopting regulations that harm foreign investors, the Parties both undermine the purpose of the agreement and cause unnecessary conflict. Additionally, the Parties need to consider the effect future FTC interpretations have on the system and whether they are succeeding in their aims. By taking unilateral actions to change or interpret the treaty, particularly in the middle of

a claim, the Parties undermine the legitimacy of the agreement. The NAFTA parties need to provide a more transparent process for future FTC interpretations.

This paper has shown several areas the agreement is lacking. However, regardless of these weaknesses, the agreement is still likely to serve as a benchmark for future international agreements, both for the current parties and other unrelated nations. The Agreement has several strong points, which have enabled the parties to try out the new approach to free trade.

By reserving the right to adopt interpretations, the Parties have maintained the right to control future areas of concern, which may include regulations regarding public health and the environment. When the protections provided by Chapter 11 are considered, it is undeniable that investors deserve protection that is greater than simply guaranteeing abstention from outrageous and shocking state behavior, but not so much protection that there is no predictability for the Parties or that otherwise distorts states' regulatory authority. The NAFTA Parties need to consider the predictability (or lack there of) of the NAFTA tribunals, and consider whether the Agreement's objective of providing predictability is being met.